

Agenda Date: August 11, 2004

Item Number: **A3**

Docket: **UT-043046**

Company Name: Qwest Corporation
Covad Communications Company

Staff: Kristen Russell, Telecommunications Regulatory Analyst
Jing Roth, Acting Director – Telecommunications
Glenn Blackmon, Acting Director – Regulatory Services

Recommendation:

Approve the Commercial Line Sharing Agreement between Qwest Corporation and Covad Communications Company under Sections 251 and 252 of the Telecommunications Act.

Background:

On May 14, 2004, Qwest Corporation (Qwest or the Company) filed a document involving the terms and conditions of a Commercial Line Sharing arrangement (Agreement). This Agreement was signed by Dieca Communications, Inc. d/b/a Covad Communications Company (Covad) and Qwest on April 14, 2004, but will not take effect until October 2, 2004; Qwest submitted the agreement on behalf of both parties.

In its cover letter, Qwest indicates that both parties agree that the Agreement is binding, but they assert that it is not within the Section 252 filing requirement of the Telecommunications Act, and therefore is not being filed with the Commission for approval under Section 252. Qwest states that submission of the Agreement is for informational purpose only.

Qwest and Covad have an existing interconnection agreement, which was approved by the Commission in Docket No.UT-980312. On June 23, 2004, the Commission approved the 16th amendment to the interconnection agreement. The amendment offers terms, conditions, and rates for the high frequency portion of the loop for new DSL orders placed by October 1, 2004.

Discussion:

As justification for filing the Agreement for informational purposes, Qwest refers to the FCC's Triennial Review Order (TRO). Qwest claims that the TRO eliminates its obligation to provide the high frequency portion of a copper loop under Section 251(c). Transitional rules, including line sharing conditions, did result from the TRO; however,

Qwest asserts that the transitional rules do not apply to new DSL services provisioned one year after the effective date of the TRO. According to the Company, there is no Section 251(c) obligation upon Qwest to provide the high frequency portion of the loop as an UNE, and thus there is no Section 252 filing obligation.

Although Qwest itself states that the commercial line sharing agreement is posted on its wholesale website and is available to any telecommunications carrier to adopt in its entirety, the approval process by the Commission eliminates any uncertainty that other competing carriers may have by simply reviewing a copy on Qwest Wholesale website. Other carriers will be able to rely on the legal right to adopt the agreement knowing the rates, terms, and conditions are fair. Staff believes that the approval of this agreement is in public interest.

Legal Analysis

The Attorney General's office has provided the legal analysis below:

Section 252(e)(1) requires that "[a]ny interconnection agreement adopted by negotiation or arbitration be submitted for approval to the State commission." Although FCC rules do not presently mandate unbundling of the high frequency portion of the loop (i.e., line sharing), the Agreement nonetheless pertains to interconnection, services, and network elements as contemplated by Section 251(c) of the Act. Under Section 252(a)(1), a binding agreement for "interconnection, services, or network elements" that is negotiated "without regard to the standards set forth in subsections (b) and (c) in section 251" is treated as an interconnection agreement.

The FCC has never suggested that agreements resulting from the commercial negotiations that it encouraged following the *USTA II* decision should be regarded as anything other than interconnection agreements within the meaning of the Act. The FCC asked "all carriers to engage in a period of good faith negotiations to arrive at commercially acceptable arrangements *for the availability of unbundled network elements* [emphasis added]." The FCC further stated "The Communications Act emphasizes the role of commercial negotiations as a tool in shaping a competitive telecommunications marketplace." Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein on Triennial Review Next Steps (March 31, 2004).

In *In the Matter of Qwest Communications International, Inc. 's Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, FCC 02-276 (2002), the FCC said that "Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected. . . . The statute expressly contemplates that the section 252 filing process will occur with the states, and we are reluctant to interfere with their processes in this area. Therefore, we decline to establish an exhaustive, all-encompassing 'interconnection agreement' standard. The guidance we articulate today flows directly from the statute and serves to define the basic class of agreements that should be filed. We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval." The FCC went on to say that "the states should determine in the first instance which sorts of agreements fall within the scope of the statutory standard. . . ."

Conclusion:

Based on the combined analysis of the filing requirements contemplated by the Act and FCC's order, Staff concludes that the terms and conditions of the Commercial Line Sharing Arrangements constitutes a voluntary negotiated agreement subject to the Commission's approval under Section 252 (a) of the Telecommunications Act.